

**University of San Francisco
School of Law**

Mediation

Course Materials

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Class One

(#1)

MEDIATOR: Views vs. Trees

You have been asked to mediate a dispute between two neighbors.

The uphill neighbor used to enjoy a spectacular Bay view before the downhill neighbor planted the back edge of her property with fast-growing Lombardi poplars.

The downhill neighbor loves her trees because of the beauty and privacy they afford her.

YOUR JOB TODAY:

- Allow both sides to tell their story. Listen. Take notes.
- Try to help the parties maintain a civil and respectful conversation
- Remain neutral
- See how many solutions you can help the parties generate.

Class One

(#2)

UPHILL NEIGHBOR (Plaintiff) – Views vs. Trees

You live in a beautiful, expensive home that enjoys a panoramic view of the Bay. You grew up in this house and you plan to die in this house. Your downhill neighbor, who moved in about 5 years ago, planted some non-native, fast-growing Lombardi poplars which now block most of your view of the Bay.

You want your view restored. Money is no object. Your lawyer has told you that there is no law in your town protecting your view, but you believe you might have a cause of action for nuisance and intentional infliction of emotional distress.

Your job today:

- Find a way to get your view back!

Class One

(#3)

DOWNHILL NEIGHBOR (Defendant) – Views vs. Trees

Your uphill neighbor is making you insane. He throws large parties, has the lights on all night, and is so rich and snooty he acts like he owns the whole hillside. You can't stand him but want to live your life in peace. A few years back, you planted some fast-growing trees to give you some noise and visual privacy. The trees keep out some of his annoying lights and provide a buffer from the noise. Plus they are beautiful. Your neighbor, though, wants you to cut them down. He has no right under the law to make you do that, but your lawyer has told you it will cost you \$25,000 to defend yourself in a lawsuit, and you have no money or desire to be involved in litigation.

YOUR JOB TODAY:

- Find a way to get your annoying neighbor off your back without compromising your privacy.

Class 2

HARK v. TRAUB – PI

(##1, 2, 3)

Plaintiff’s Settlement Conference brief:

This is an automobile accident that took place last year on September 17 on Sir Francis Drake Blvd in Kentfield. Plaintiff Hark’s vehicle was moving slowly when it was rear-ended by defendant Traub. Plaintiff sustained severe and permanent personal injuries. Her medical bills total \$13,779. Her vehicle sustained major damage in the sum of \$11,591. The defendant vehicle had damages totaling \$10,919. Plaintiff was wearing a seatbelt.

Plaintiff’s medical bills are as follows:

1. Ambulance	\$ 988.
2. Hospital ER	\$1700.
3. ER Physician	\$ 237.
4. Primary Care Doctor	\$ 117.
5. Massage	\$ 510.
6. Chiropractic	\$4290.
7. MRI	\$2850.
8. Upright MRI	\$2250.
9. Orthopedic Surgeon	\$ 642.
10. Physical therapy	\$ 200.
11. Prescription meds	\$ 25.
Subtotal	\$13,779

Other damages:

1. Loss of use of car	\$ 690.
2. Loss of gym membership	\$ 210.
3. Loss of triathlon	\$10,000.
4. Cost of driving to/from drs	\$ 85.
5. Loss of time for dr. visits @ \$100/hr	\$ 5,800.
TOTAL DAMAGES	\$30,500.

Plaintiff sustained injuries to her neck and back resulting in headaches, concussion, dizziness, short term memory loss, fatigue, sleep disturbance, pain, and weakness. Her chiropractor recommended massage and MRI in addition to his treatment.

His report of one month ago indicates that plaintiff has a plateau with mild to moderate limitations of her c-spine. He has recommended 2 visits/month x 6 months @ \$160/visit for a total of \$1920 in future medical specials.

Plaintiff was someone who trained for competitions and did vigorous exercise as a lifestyle. She has been an athlete her whole life. She was on the gymnastics team in high school, had an athletic scholarship to college, and has been a marathon runner since 2004. She finished in the top group of the Treasure Island Triathlon and Sacramento Triathlon. She was again training for a triathlon this year but was unable to compete because of her injuries. In addition, she has been unable to bike and swim in the bay as a result of her injuries.

Plaintiff was unable to do any type of physical activity for 4 months following the crash. At this point, she does not know whether she will have any relapses. She was unable to use her gym membership following the accident. She spent 2 hours of her time for her 29 medical visits. She has not returned to her pre-accident status and continues to have pain.

Plaintiff's CCP 998 offer was in the sum of \$39,999.99. Defendant's CCP 998 offer was in the sum of \$20,001.00. Both offers were rejected. Plaintiff's current demand is \$50,000.

Defendant's Settlement Conference Brief

This matter arises out of a September 17 motor vehicle accident near the intersection of Sir Francis Drake Blvd and Laurel Avenue in Kentfield, California. Both Plaintiff and Defendant were driving eastbound on Sir Francis Drake when the front end of defendant's vehicle made contact with the rear end of Plaintiff's vehicle. As a result of the accident, plaintiff claims medical and chiropractic expenses. She does not claim a wage loss.

The evidence shows that plaintiff did not suffer a significant injury in the subject incident. By all accounts, the collision between the two cars was not a major one. Plaintiff's car was moving forward at the time and thus deflected much of the force. As per standard procedures, the emergency paramedics placed plaintiff on a board and in a cervical collar and brought her to the Emergency Room.

At the hospital, the ER doctor noted in his report that this was a low speed incident with minimal damage to the subject vehicles. Significantly, he noted that plaintiff did not strike any body parts within her vehicle or sustain a loss of

consciousness, laceration, fracture or dislocation, as confirmed by x-rays. She was diagnosed with a cervical strain/sprain.

Plaintiff sought physical therapy, massage, and chiropractic treatment, much of which was unnecessary and unreasonable. Two days after the accident, plaintiff visited her long-standing massage therapist, and continued with this form of non-referred treatment for a total of 6 times for \$550. She visited her primary care physician, who recommended physical therapy. The doctor did not recommend chiropractic treatment in addition to the PT. Plaintiff went to PT only once. Against doctor's orders, she discontinued her PT and resumed her treatments with her chiropractor.

Defendant also takes issue with the 2 MRI's. Why did plaintiff need a second MRI? Defendant should not have to pay for this.

The defense has hired its own expert, a qualified orthopedic specialist, to conduct a records review. The defense expert states that plaintiff sought excessive and unnecessary treatment. She says that plaintiff sustained a musculo-ligamentous strain of her cervical spine and the reasonable treatment for such an injury should not exceed six to eight weeks. Finally, the doctor does not anticipate any residual disability or need for further treatment.

Despite the active lifestyle maintained by plaintiff prior to the incident, the injuries documented by her physicians were such that plaintiff's life should and did not affect her as grievously as asserted. Plaintiff has not sought medical treatment for emotional distress or pain management. Her injuries are not commensurate with the facts of the incident. The treatment was unnecessary and excessive. The injuries were not so great as to affect plaintiff as claimed.

Defendant issued a CCP 998 in the sum of \$20,001. Because defendant has been forced to expend further funds, its current offer is \$9,500.

Class Three

Estate of Maletta

(##1, 2, 3)

Angela Maletta died at the age of 72, leaving three adult children: Angelo (50), Salvador (47) and Maria (40). Her estate consists of a modest but unencumbered home in Novato, worth \$550,000. She has cash of \$150,000, an old Honda valued at \$2,500, and some jewelry and personal items worth \$10,000. Her will names Angelo as the executor and leaves her property equally to her three children.

Angelo and Salvador live in Washington and work together in a successful real estate partnership. They each have families, expensive homes, golf club memberships and big private school tuition obligations. Their families socialize frequently.

Maria is unmarried and has no children. She moved back with her mother ten years ago, after suffering an industrial injury that caused her to be placed on permanent disability. Angela was only too happy to have her daughter live in the family home, and Maria took excellent care of her mother in the difficult last years of life when Angela had cancer.

Angelo and Salvador would like to divide the estate according to their mother's wishes. Maria is devastated by the death of her mother and the potential loss of her only home. She does not want to move and has no funds to afford alternate housing in expensive Marin County.

Although Angela bragged to everyone about how grateful she was that her daughter took care of her, everyone knows that her firstborn Angelo was "the apple of her eye." The kids always teased their mother about that growing up. For her part, Maria always felt like the two brothers teamed up on her.

Angelo and Salvador are represented by one lawyer.

Maria has her own lawyer, and she is challenging Angelo's ability to sell the house.

Class 3

ESTATE OF MALETTA: Confidential Information for Mediator

(#3)

Meet with your co-mediator (if assigned) in advance of class to decide what your strategy will be and to divide these assignments. The two of you should discuss what concerns you have about handling this case; what emotions you are likely to encounter and how you will handle them. Will you keep the participants in the same room? Why or why not?

You will be given 20 minutes to handle each of the following segments of the mediation.

1. **OPENING SESSION:** Mediators sometimes start with all participants present; just the attorneys present; or just one party and his or her lawyer. You will model an opening session with Angela and her lawyer. Your goal is to understand what makes Angela tick. Demonstrate good listening and comprehension. Allow for the emotional expression.
2. **SEPARATE SESSION:** Meet with Angelo, Salvador and their lawyer in a separate caucus for the purpose of discussing what this lawsuit has been like for each of them. What has it been like to be involved in a lawsuit with their sister over their mother's estate? What toll has it taken on their relationships?
3. **JOINT SESSION:** Ask the parties to meet together to discuss all the ways the parties might resolve the case. Remind them that no idea is a bad idea, and that the more options they generate, the more likely they are to hit upon something that might work. You might start by stating the extremes: One option is that Maria stays and the brothers give up their interest in the home. Another option is that Maria goes and the house is sold as part of the estate. What are other possibilities? Challenge the participants to think of as many ideas as possible. The mediators should write down every option and check with the parties to make sure they have properly understood each option.

Class Three:

ESTATE OF MALETTA: Confidential Information for Angelo and Salvador

(#2)

The brothers really want to settle the case, but their wives are insistent that they not give away their inheritance. Both wives feel very strongly that Angela would want to support her grandchildren.

Salvador is embarrassed to say this, but he feels bad about kicking his sister out of the house. When Angela fell ill, Maria asked both brothers for help, and neither of them were able to respond. Salvador feels grateful that Maria was available to help out his sister. Salvador, though, does not want to rock the boat with his brother.

The law is on the brothers' side. They know they can force a sale of the property.

Class 3

ESTATE OF MALETTA: Confidential information for Maria

(#1)

This case is killing Maria. She has done everything she can think of to be a good daughter and a good sister. She can't believe her mother didn't give her the house, and even though she loves her mother, she feels resentful and angry. After all, the boys have their own houses and their own lives, with wives and children. Maria has nothing. She devoted her life to her mother. Her mother would not want her homeless. Maria receives disability and has the means to pay for the taxes and insurance on the family home. She will not go down without a fight. Under no circumstances will she agree to move out of the family home. Only if the court issues an order will she move, and even then she will put off for as long as she can. She cannot afford to pay for a lawyer, but she is considering representing herself if the case goes to trial.

Class 4

Listening Worksheet

1. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

2. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

3. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

4. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

Class 4

Listening Worksheet

1. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

2. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

3. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

4. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

Class 4

Listening Worksheet

1. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

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- a. Two positive qualities:
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3. Listener's name: _____

- a. Two positive qualities:
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- c. My mental chatter:

4. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

Class 4

Listening Worksheet

1. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

2. Listener's name: _____

- a. Two positive qualities:
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- c. My mental chatter:

3. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

4. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

Class 4

Listening Worksheet

1. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

2. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

3. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

4. Listener's name: _____

- a. Two positive qualities:
- b. One "needs improvement" observation:
- c. My mental chatter:

Class 4

Listening I

(##1, 2, 3)

Listening is a skill.

Everyone thinks they are already good at it because they can hear.

Law School ruins you for listening.

It's a skill that works in every area of your life.

It's a skill you can improve on all the time.

You can never be too good of a listener.

It is about being curious, teachable, willing to learn.

Not knowing all the answers.

Bad Listening Styles

- Thinking of what we're going to say
- Interjecting our own stories
- Interrupting
- Asking questions to satisfy our own curiosity
- Judging the speaker's manner or characteristics
- Listening only for "relevance"
- Faking attention
- Letting mind wander
- What is your worst listening habit?

Attitude that Supports Communication

- Respect: I respect your point of view
- Empathy: I understand what you are saying
- Caring: what you have to say is important.
- Curiosity: I am interested
- Nonjudgmental: Your view point makes sense for you

- No agenda: I do not have a preconceived notion of the result.

Raise your LQ

- Listening is more than not talking
- More important to hear than to agree
- Don't need to have all the answers – in fact, better not to!
- Q-TIP
- Be OK with any answer
- Maintain positive mental focus
- Set a goal
- Be willing to hear the feeling

“Here’s why I will be a good person. Because I listen. I cannot speak, so I listen very well. I never interrupt, I never deflect the course of the conversation with a comment of my own. People, if you pay attention to them, change the direction of one another’s conversations constantly. Learn to *listen!* I beg of you. Pretend you are a dog like me and listen to other people rather than steal their stories.” *The Art of Racing in the Rain*.

Listening Exercise

- Speaker takes 4-5 minutes to share a problem
- Listener practices best active listening
 - Minimal interruptions, questions, personal shares
 - Reflect back, verify
- Speaker gives honest feedback on how well Listener heard and understood

Reflecting Back

- Ensure that you have heard correctly
- Summarize, without echoing, speaker’s words
- Challenge is not too much, not too little
- Try using same key words but don’t sound like an echo!
- Try listening for the emotion, but don’t worry about being a psychologist

Repeat listening exercise, switch partners

Really good listeners help people to understand their problem better

We all love to be listened to fully

How does this relate to mediation? How does this relate to preparing your client for mediation?

Class 5

Blue v. Gray's Place (ADA case)

(##1, 2, 3)

Cast of characters:

Plaintiff: Ada Blue, a 55-year old resident of San Francisco. Ada suffers from a neurological disease that confines her to a wheelchair. Although physically infirm, she is mentally intact.

Plaintiff's attorney: Bobbi Green, a newly-minted lawyer who went to law school to make the world a better place for poor, disabled, and otherwise unfortunate clients.

Defendant: Charlie Gray, the 62-year old owner of Gray's Place on California Street in San Francisco. Gray's Place is a popular Italian restaurant started by Charlie's grandfather in 1922. Charlie has worked at the restaurant since graduating high school. His son, Charlie Jr., is the executive chef at Gray's Place.

Defense attorney: Andrei Ochre, a senior partner at an insurance defense firm. He was retained to defend Gray's Place by the restaurant's insurer, Acme Indemnity Co., the firm's largest client.

Facts:

Ada went to the banquet room of Gray's Place on May 3 for a celebration of her grandson's 7th birthday, which was attended by 20 other family members of all ages. Early during the meal, Ada wheeled herself to the women's room. The seat was higher than allowed by the Americans with Disability Act (ADA) and there was no bar on which Ada could brace herself. She fell off the seat and wet herself. She lay on the floor until another patron found her there 15 minutes later and called for help. Ada's sister helped her clean up as well as she could and then drove her home, causing Ada to miss most of the party.

The lawsuit:

Bobbi filed suit on behalf of Ada, alleging violation of the ADA. She seeks compensatory and statutory damages, attorneys' fees, and a court order requiring Charlie to bring the restaurant into compliance, a fix that would cost Charlie at least \$100,000.

This is an early mediation. The parties hope to resolve the dispute without incurring the expense and pain of lengthy litigation.

Class 5

Blue v. Gray's Place (ADA case)

(#2)

Plaintiff – Confidential Information

You have multiple sclerosis. You were first diagnosed 25 years ago. At first, your symptoms were not severe. You were able to work at your job as a systems analyst, maintain your household, and live an active life. Within a few years, though, the symptoms got worse. Fifteen years ago, you had to stop working. A few years later, your spouse moved out, explaining that the marriage license said nothing about promising to be your nurse. The court gave your spouse primary custody of your children, accepting your spouse's argument that you would be less able to care for them, physically and financially.

As your condition has deteriorated, you have become more withdrawn and isolated. Your children rarely invite you to participate family functions. You are not sure whether you embarrass them, whether you are too much work, or whether they simply find your disease too much to handle.

The birthday party at the restaurant was an important event to you. You had been looking forward to the dinner for weeks. You had not seen your grandchildren in months. You were glad to learn that the restaurant had wide doors and no steps so you could use your motorized wheelchair.

The dinner started off well. You felt welcomed and included. A short way into the dinner, you excused yourself and went to the restroom. You fell from the seat and landed on the floor after wetting yourself. You could not get back up by yourself and you were too embarrassed to call for help. After 15 minutes a stranger saw you on the floor and went for help. Your sister came to help you off the floor, clean you up, and take you home. You were humiliated to see how your family looked at you as you left the restaurant; in their eyes you saw disgust and pity. You fear that you will not again be invited to participate in family activities. You see nothing ahead for yourself but loneliness.

When you learned that the bathroom at the restaurant did not comply with ADA guidelines, you were angry and upset. The ADA has been on the books for 20 years! One simple adjustment to the bathroom and you would not have fallen. Although it may be too late for you to regain your own independence and happiness, perhaps there are others who can be spared the same fate.

Class 5

Blue v. Gray's Place (ADA case)

(#3)

Defendant – Confidential Information

Your grandfather started the restaurant in 1922. It remains in the original location. His son (your father) ran the restaurant until a few years ago, when you became the proprietor. You are hoping your children will take over at some point so it can stay in the family. You love the restaurant and feel more at home there than anywhere else.

Over the years you have tried to maintain the fixtures and décor, but the customers seem to like its old-fashioned look and feel. You run a family restaurant, not a trend-setting destination that will be gone as soon as the next fad arrives.

The recession has taken its toll. Although labor and food costs are as high as ever, you have had to lower prices to stay competitive, and business is still down quite a bit.

You understand the importance of accessibility and you try, within reason, to keep your restaurant available to anyone who wants to eat there. You widened the doors and put a ramp to the mezzanine. However, you don't know why the plaintiff fell that day. Technically, it turns out the seat is two inches too high, or maybe too low. Two inches! That could hardly make a difference. And if you fix that problem, it will be considered a "renovation," which will require that you bring the entire restaurant into compliance with the ADA, energy efficiency regulations, emergency evacuation lighting, and who knows what else. The renovation will trigger a property tax renovation. All you know is that it will cost you at least \$100,000 to fix this 2-inch problem that may or may not have caused the plaintiff's accident. You have maybe four disabled patrons a year as it is. None of them have ever fallen, at least not until now.

Class 6: CHRIS O'DELL –Preparing Client for Mediation

(##1, 2)

ATTORNEY – CONFIDENTIAL INFORMATION

This is a lawsuit for personal injuries arising out of a motor vehicle accident. The accident happened two years ago on Highway 101 in San Mateo.

You represent the plaintiff, Chris O'Dell. Chris was riding a motorcycle in the middle of three lanes. Defendant, driving an SUV, changed from the right to the middle lane directly in front of Chris. Chris slammed on the brakes but could not avoid crashing into the rear of the SUV. Chris sustained serious back injuries, underwent spinal surgery, and missed a great deal of time from work.

The CHP officer who investigated the accident assigned fault to the SUV driver. However, your investigator has interviewed witnesses who say that Chris was traveling well above the posted speed limit just before the accident, and had been weaving in and out of lanes through traffic. Your witness statements have not been shared with the defense, although you are aware that the defense may have talked to the witnesses as well.

Defendant is insured with National Farm Insurance, known for its hardball tactics and lowball offers. National will be represented at the mediation by its in-house lawyer, who will be accompanied by an experienced claims representative familiar with the case. Defendant's available insurance is \$1,000,000.

You believe that the most likely range of jury verdicts is between \$500,000 and \$750,000. However, you are concerned that the jury might reduce the award by assigning a percentage of comparative fault to Chris, probably in the 1/3 to 50% range. In your view, Chris should jump at any offer at or above \$350,000.

You are concerned that Chris may have unrealistic ideas about how much he should get in settlement. Chris has told you repeatedly that his life has been permanently altered and that he will not consider any offer under the policy limits (\$1,000,000). In past conversations, Chris has rejected the issue of comparative negligence, adamantly insisting he did nothing wrong and that "any jury in this country" will agree with him.

If you must take this case to trial, your fees go up from 1/3 to 40% of the gross verdict, and the likely advanced costs (\$50,000 for experts and jury fees) will also come out of plaintiff's recovery.

You have put in a great deal of work on this case and will be prepared for trial if necessary. However, given the risks involved, you do believe that Chris would be better off if he can settle for a sum certain, as opposed to taking a chance on getting more at trial.

Class 6

(## 1, 3)

CLIENT – CONFIDENTIAL INFORMATION

This is a lawsuit for personal injuries arising out of a motor vehicle accident. The accident happened two years ago on Highway 101 in San Mateo. You are the plaintiff, Chris O'Dell. You were riding a motorcycle in the middle of three lanes. Defendant, driving an SUV, changed from the right to the middle lane directly in front of you. You slammed on the brakes but could not avoid crashing into the rear of the SUV. You sustained serious back injuries, had spinal surgery, and missed a great deal of work.

You have recovered from the worst of your injuries but your back hurts every day. You will never have the same level of mobility. This affects you every day, from the moment you wake up to the time you go to sleep at night. In fact, the pain keeps you from sleeping well and you often have to take medication just to sleep. Some of the things you enjoyed the most on your days off (skiing, hiking, jogging) are now difficult or impossible. You always took pride in your physical condition and athletic ability, but now you can barely make it through the day at work, and have no real energy for your previous “weekend warrior” activities. This was all because some moron in an SUV couldn't be bothered to look before changing lanes.

The CHP officer who investigated the accident assigned fault to the SUV driver. Your lawyer has mentioned something about “comparative fault” but you don't know why that would apply, as you did nothing wrong.

You understand that the SUV driver has a million dollars of insurance. You believe that your injuries and losses are worth far more than that. You have heard that people get millions of dollars when they spill coffee on themselves or fall through the roof of a home they are burglarizing. You are more deserving than any of them.

This is your first experience in a lawsuit. You are not familiar with the process. You have only a vague idea what to expect at the upcoming “mediation.”

You are a little concerned about your lawyer's reason to go to mediation. You are worried that offering to settle will make you look weak or unwilling to go to trial. You believe that any 12 people on the jury will agree with you so there is little reason to compromise.

You are also a little concerned that your lawyer is not willing to fight for you in court. At your deposition, your lawyer was very friendly with the opposing lawyer. Your lawyer and the opposing lawyer (whom you did not like at all) shared stories about mutual lawyer-friends.

You do not have a clear picture of what will happen at the mediation, or, if the case doesn't settle, of the next steps on the way to trial.

Class 7

BATNA WATNA EXERCISE: LI v. HAGOPIAN

(##1, 2, 3)

Li and Hagopian operated a tire shop in San Bruno. Each was a 50% partner, sharing the profits and losses equally.

The lease expired last year and the business closed. All equipment and inventory was liquidated. There are no debts. There is \$100,000 in cash that must be divided.

Li is adamant that she worked harder and should be entitled to more than her \$50,000 share. She thinks a jury would award her the full \$100,000. In addition, she believes that Hagopian took an unauthorized draw of \$20,000, which should be repaid to the partnership.

Hagopian denies taking the unauthorized draw and contends that he worked just as hard. In any event, it was a 50-50 partnership and the assets are to be divided accordingly, regardless of who did what work.

Each party has a lawyer. Each lawyer has privately advised his client that he will charge roughly \$30,000 to take this case through trial. The partnership agreement does not have an attorney's fee clause, so the parties will have to pay their own lawyer, regardless of the trial outcome.

Class 7

BATNA/WATNA HYPOS

(##1, 2, 3)

1. LANDLORD/TENANT

Landlord has filed an unlawful detainer action against Tenant for failure to pay rent. Tenant owes 3 months' rent of \$2,000 per month. Landlord wants Tenant gone immediately because he has a new tenant ready to move in on the first. Landlord will incur additional attorney's fees of \$3,000 if the matter goes to trial. Trial is set in 10 days, and it will take the sheriff an additional 20 days to evict Tenant. Tenant has no money, no prospects of finding housing, and no ability to respond to (pay) a judgment. He is willing to vacate in 45 days. Tenant cares about his credit score, and he knows that an adverse judgment will ruin his credit and make it almost impossible to find housing. He has no lawyer. The lease contains an attorney's fees provision.

2. DARLING DAUGHTER/LOSER SON

Mom bequeathed her estate to her children as follows: \$200,000 to her Darling Daughter and \$20,000 to her Loser Son. Both sides will incur attorney's fees of \$50,000 to litigate. There is no right to recover attorney's fees. Son has filed a will contest and is requesting a 50-50 division. There is a no-contest provision in the will, and if he loses he will forfeit the \$20,000 bequest under the will.

3. VIEWS/TREES

Parties are neighbors and neither wants to move. Plaintiff wants his view back. It will cost him \$25,000 to prosecute the case and he is not likely to win. Even if he does, it is extremely unlikely that the court would require anything more than a trimming of the trees. Defendant will also pay \$25,000 to defend the case. She loves the woodsy feeling of her home and wants nothing more than to live in peace with her litigious and noisy neighbor. There is no right for the prevailing party to recover fees.

Class 7

NEGOTIATION PART 1

(##1, 2, 3)

1. *Pedestrian-Auto case, Merle v. Regina*. Plaintiff, an 82 year old man, was brushed in the sidewalk by defendant's vehicle while defendant was on her cell phone. Plaintiff has medical bills of \$15,000 and the case is worth between \$25-\$30k. The lawyers hate each other; each considers the other is unethical. Plaintiff's demand is \$75k; defendant's offer is \$1k. Both sides want to go to trial and win. The expert costs for both sides are \$10-\$20k.

2. *Estate of Maletta*. In this case, Son and Daughter equally inherited their mother's estate. Mother left the family home, (\$500,000), cash (\$450,000), and several items of personal property that each child feels should be theirs: a 1966 Austin Healey (\$35,000), silverware (\$30,000), Chinoiserie collection (antique ceramics and cloisonné, worth \$40,000 as a set and significantly less if broken up), a painting of the two siblings as children by a now-famous painter (\$50,000). Each party feels strongly about each item.

3. *Neighbor Dispute*: Plaintiff is suing his neighbor for encroachment. He recently had his property surveyed and found that the neighbor's pool encroaches on his property line by one foot. He wants the encroachment removed. The fence between the properties is falling down and he wants it replaced after the encroachment is removed. Defendant is an

innocent purchaser and did not know of the encroachment. He is unhappy because Plaintiff keeps 6 barky dogs. The city restricts each residence to 5 dogs.

4. *ADA case*: Plaintiff is wheelchair bound due to MS. At a birthday party, she suffered an embarrassing accident in the non-ADA compliant restroom of a small family restaurant. She is suing for failure to comply with ADA rules and for negligent and intentional infliction of emotional distress. Her demand is \$250,000. The restaurant has been in the family since 1922. They have no insurance for most of this claim, but they have made the restaurant ADA-compliant. The negligent infliction of emotional distress may be covered by the restaurant's insurance policy.

Classes 7, 9

Observer Worksheet – Negotiations I and II

Mediator:

Plaintiff or plaintiff attorney:

Defendant or defendant attorney:

Tools used:

What I liked:

Other observations:

Classes 7, 9

Observer Worksheet – Negotiations I and II

Mediator:

Plaintiff or plaintiff attorney:

Defendant or defendant attorney:

Tools used:

What I liked:

Other observations:

Classes 7, 9

Observer Worksheet – Negotiations I and II

Mediator:

Plaintiff or plaintiff attorney:

Defendant or defendant attorney:

Tools used:

What I liked:

Other observations:

Class 8

CHESTER MERLE V. LAURA REGINA Based on an actual case

(##1, 2, 3)

Plaintiff's Settlement Conference Brief

Defendant is taking the position that because plaintiff is of advanced age (79 years old at the time of the accident), his physical condition had deteriorated before he was hit by her car and therefore she is not responsible for his injuries.

Defendant admits she struck plaintiff with her vehicle while he was walking in a crosswalk on the afternoon of November 10 of last year. She was cited by the Novato Police for failing to yield to a pedestrian. She admitted to the officer that she was distracted. As a result of the impact, plaintiff was thrown up in the air. He landed on the hood and slid off the car.

Despite defendant's description of the impact as a "light brush," it was enough to break the skin and cause a contusion just below plaintiff's left knee.

The day after the accident, plaintiff woke with significant pain and vertigo. The stiffness he ordinarily felt in his neck was markedly worse. The next day he saw Dr. Zeller at Chiropractic, Inc. He complained of pain in his neck, right shoulder, low back, left knee, and groin as well as dizziness. He treated with Dr. Zeller 47 times in the ensuing 3 months. Although his condition improved somewhat, there are significant residuals from the accident.

When the vertigo did not improve after a month, Dr. Zeller referred plaintiff to a neurologist for evaluation. The neurologist did not find evidence of a concussion but felt that plaintiff might have been experiencing a level of anxiety similar to a traumatic brain injury. She noted that plaintiff's complaint of dizziness was supported by his prominent nystagmus. She prescribed Meclizine for the vertigo and advised the use of a cane for walking.

Plaintiff was evaluated by an orthopedic specialist 11 weeks post-accident. He noted plaintiff's shoulder, back and knee were slowly improving with conservative care.

As a result of defendant's negligence, plaintiff suffered a "burst" or "compression" fracture of his L-1 vertebrae with 80% central vertebral body height loss. Dr. Nguyen, a radiologist, read the MRI results and testified that the burst fracture was an

“acute/subacute” injury, meaning that the injury occurred less than 3 months before the MRI. The MRI was one month after the accident. Defendant has no evidence that the L-1 burst fracture was a pre-existing condition. Instead, defendant relies on the insinuation that due to plaintiff’s age, the fracture occurred independent of the accident and that plaintiff was just walking around unknowingly with a burst fracture in his lumbar spine.

Plaintiff still has sleep disturbances due to right shoulder and back pain. The accident was very traumatic and plaintiff continues to have intrusive dreams about it. He has not been well enough to accept the part-time sales job he was planning on at the time of the accident. His employer-to-be testified that she had offered plaintiff a job in sales where he had previously worked.

Plaintiff’s economic damages are as follows:

Chiropractor	\$5,779
MRI	\$3,600
Neurologist	\$ 900
Orthopedist	\$1,000
Lost earnings	\$11,440.
TOTAL	\$22,719.

Plaintiff has extensive non-economic damages. He has experienced physical pain, mental suffering, loss of enjoyment of life, anxiety, emotional distress, and inconvenience, all due to the clear negligence of plaintiff.

Plaintiff served a 998 Offer to Compromise for the policy limits of \$50,000, which was not accepted. Accordingly, the policy is now “open.” The parties were unable to resolve the matter at the mediation last month. After the mediation, defendant served a 998 offer of \$12,000, which plaintiff did not accept.

Plaintiff’s current demand is \$75,000.

Defendant’s Settlement Conference Brief

Plaintiff admittedly can “sell ice to an Eskimo,” which is what he is attempting to do with his dramatic and exaggerated version of this minor accident which did not even cause him to fall to the ground.

This minor pedestrian vs. auto accident occurred on November 10 of last year at the intersection of Grant and Reichert Avenues in Novato. Defendant was stopped at the intersection and failed to see plaintiff (d.o.b. 3/5/32, age 81). She slowly made a left turn

after her stop. The front of her 2011 BMW 528i lightly brushed plaintiff's leg. She looked in her driver's side mirror and saw him leaning against her car. Police responded to the scene, and plaintiff joked with the officer that he had taken tougher hits when he played ice hockey. Plaintiff declined medical treatment at the scene. Defendant admits liability for the accident, but disputes the nature and extent of plaintiff's claims.

The police report states, "The impact swung MERLE around, but he was able to maintain his balance and did not fall to the ground." However, plaintiff's story took a dramatic turn at his deposition. He testified that the impact caused him to "go flying over" the hood of defendant's BMW, and that he landed face first on the windshield before sliding off the hood of her car. This is a tale taken from a movie such as "The Matrix." And in spite of this hyperbole, plaintiff did not sustain injuries to his face or chest, and the BMW had no damage to the windshield or hood.

INJURIES: Plaintiff claims a mild compression fracture at L1; left knee abrasion; aggravation of pre-existing rotator cuff injury; neck and back pain. Despite these seemingly significant complaints, plaintiff did not seek treatment for 2 days, and he then went to his chiropractor.

Plaintiff has a long history of left leg, right shoulder, neck pain and dizziness. His left leg pain dates back to 4/27/05 when he fell off a ladder. His right shoulder pain dates back to 2004 when he moved to the Bay Area and started treatment at the VA hospital. He complained of neck stiffness on 1/31/07 and again on 12/19/07. An x-ray was taken which showed degenerative changes and bone spurs. His history of dizziness dates to 2004 when he sought treatment at the VA hospital for dizziness when he sat or stood up quickly.

In addition to plaintiff's 47 chiropractic visits, he had a neurology consultation. The doctor found that plaintiff "cannot be said to have harbored a concussion. The checklist of symptoms submitted raises the suspicion of an anxiety disorder."

The MRI confirmed plaintiff's prior diagnosis of right rotator cuff tear and possible impingement.

At the recommendation of his lawyer, plaintiff saw an orthopedist for his shoulder, knee, and back complaints. Plaintiff declined any further treatment for any of these complaints. The doctor agreed that conservative treatment was best. On exam, there were no abnormal findings. The left knee exam showed full range of motion.

Plaintiff never consulted with his primary care physician at the VA.

ALLEGED WAGE LOSS: This 81-year-old plaintiff makes a wage loss claim, even though he had not worked since he was 75 years old. He was not employed at the

time of the accident, and his only evidence for his wage loss claim is a letter offering part time employment at India Trading House as a cashier. The letter was authored by his son's girlfriend. There is no evidence that plaintiff accepted this job or that he would have started working after being retired for more than 4 years.

Plaintiff testified that up until this accident, he was a very active man, playing golf regularly with his son. However, his son testified at deposition that he and his father had not played golf for several years, and in fact the two are not even on speaking terms at the moment.

THIS IS A MINOR CASE. Plaintiff sustained at most a soft tissue injury to the left knee. He testified that the knee pain went away after 2-3 chiropractic treatments. Therefore, the only reasonable medical costs would be for his first 3 treatments, or \$545. The wage loss claim is not credible.

Plaintiff served a 998 demand for the policy limits of \$50,000. The parties were unsuccessful at mediation. Defendant then served a 998 offer for \$12,000. Plaintiff did not accept it. He fired his lawyer and recently hired a new one.

CLASS 8

OBSERVATION WORKSHEET: MEDIATION DEMONSTRATION

The Joint Session – What made the biggest impression on you?

What did you notice about the lawyers' presentations?

What role did the parties play in the joint session?

The Separate caucuses – What made the biggest impression on you?

Example of active listening:

Example of looping back:

Example of reframing:

Did the mediators “Search beneath the surface?” Example:

What communication techniques did you observe?

What were the positions? What were the interests?

What were your overall impressions?

Class 9

(##1, 2, 3)

California Civil Jury Instructions (CACI)

2501. Affirmative Defense - Bona fide Occupational Qualification

[*Name of defendant*] claims that [his/her/its] decision to [discharge/ [*other adverse employment action*]] [*name of plaintiff*] was lawful because [he/she/it] was entitled to consider [*protected status—for example, race, gender, or age*] as a job requirement. To succeed, [*name of defendant*] must prove all of the following:

1. That the job requirement was reasonably necessary for the operation of [*name of defendant*]'s business;
2. That [*name of defendant*] had a reasonable basis for believing that substantially all [*members of protected group*] are unable to safely and efficiently perform that job;
3. That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and
4. That it was impossible or highly impractical for [*name of defendant*] to rearrange job responsibilities to avoid using [*protected status*] as a job requirement.

Class 10:

Negotiations Part 3

Individual Role Plays and Feedback

(##1, 2, 3)

Please review the following hypotesis in advance of class. You will be required to serve as mediator, lawyer, or observer for each hypo. Each mediator will be given 20 minutes to mediate, followed by 5 minutes of feedback. The faculty member will then give Mediator an opportunity to retry a suggested portion for 5 additional minutes. **Plan on spending at least one hour preparing for this session.** In addition to using their best reflective listening skills, Mediators must use **at least two** of the following tools in their role play:

BATNA/WATNA	Baby Steps	Do the Math
Bracketing	Coaching	Draw a Picture

Mediators will be using their tools mid-mediation. Assume that the parties have had a few rounds to discuss the facts, feelings, and current offers and demands.

1. Tenant v. Landlord

Tenant is suing Landlord for the failure to return her security deposit of \$10,000, plus treble damages for failing to itemize the deductions to the security deposit within 20 days, plus attorney's fees (\$10,000). Landlord did not return the deposit because the house was trashed and he was obligated to repaint (\$5,000) and re-carpet (\$5,000).

Tenant kept a cat in violation of the lease, and the cat had its way on the carpet.

Plaintiff's demand is \$40,000 and defendant's offer is \$500.

2. **Neighbor v. Neighbor**

The parties live next to each other in an expensive area of town. Defendant neighbor has a large Monterey Pine that drops pinecones (which the plaintiff calls “torpedoes”) all over Plaintiff neighbor’s yard. Plaintiff considers the tree a nuisance and wants it removed. Defendant considers the 50 year old tree the property’s pride and joy. The properties are separated by an old deer fence, which has holes in places. Plaintiff’s two dogs jump through the fence and poop in defendant’s garden. (Plaintiff thinks this is hilarious) Defendant would like to replace the deer fence with a tall, secure, private redwood fence. Because the fence will be on the property line, defendant would like plaintiff to share the costs. Plaintiff doesn’t mind if the old fence is repaired, but since a redwood fence would require the removal of his award-winning rose bushes, he is opposed to it. Neither side wants to move and both parties would prefer to live in peace.

3. **Slip and Fall**

Plaintiff slipped and fell in defendant’s grocery store. It was rainy and there was a leak in the roof of the grocery store. The store had placed caution cones around the wet area, but the cones did not deter customers from walking on the wet floor. Plaintiff fractured her hip (\$50,000) but has made a reasonably good recovery. She missed six weeks from her work selling pharmaceuticals (\$10,000). The grocery store is self-insured up to \$250,000, which means that the store pays is responsible for paying its attorney’s fees and any settlement up to \$250,000, and then the insurance kicks in. Both sides agree that there is likely to be some comparative fault if plaintiff recovers. Plaintiff places it at

10%, defendant at 50%. Experts will cost each side \$15,000, and there is no recovery of attorney's fees. Plaintiff's demand is \$200,000 and defendant's offer is \$5,000.

4. Architect v. Homeowner

Architect is suing his former client, Homeowner, for recovery of his professional fees for architectural services rendered in the design of Homeowner's new home. The unpaid fees total \$150,000, plus prejudgment interest of \$10,000 and attorney's fees of \$50,000. Homeowner concedes that Architect rendered services, but claims the fees are excessive and the work product was not usable. Homeowner ultimately had to hire another design professional to finish the work. The house has now been built. Architect claims that the home is substantially his design, except for a few modifications that substantially decreased the home in appearance and value. There is no insurance for either claim. The contract contains an attorney's fee provision. Neither side has made an offer or a demand.

Class 11: Seal the Deal

(#1, 2, 3)

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SOLVING STALEMATES FORUM COLUMN

**By Lynn Duryee
and Matthew N. White**

It's 3 p.m. The lawyers and litigants have been hard at work with their settlement judge for hours. Progress dwindles to a creep; frustration rises and negotiations grind to a halt. Both sides report they have been stretched to the limit and cannot make another move. Participants are worn down, disappointed and anxious to call it quits.

Here are 10 things lawyers and judges can do to keep the conversation going and break through the stalemate.

1. Call a recess: Anyone who has worked the Sunday crossword knows the feeling of being utterly stumped, only to pick it up an hour later and find the missing answers are easy and obvious. The same can be true for case resolution. Taking a time out for a cup of coffee or a good night's sleep can help the participants rest and recharge. New ideas may emerge; proposals that were once seen as unacceptable may appear in a different light.

2. Change the subject: Impasse often occurs when the participants focus solely on money. Try talking about something else: How does the plaintiff like her new job? What are the liens in the case? What has the experience of the suit been like for her? It may be worthwhile to explore nonmonetary issues, such as an apology or a letter of recommendation. Changing the subject will keep the parties talking, thereby maintaining a commitment to the process.

3. Ask for help: Whether you are the judge or the lawyer in a settlement

conference, you are not responsible for coming up with all the good ideas. If you reach an impasse, acknowledge it. You are not revealing weakness or incompetence if you ask for suggestions. "We seem to be stuck here. How can we make more progress?" "What else do you need to know about our witnesses to be able to evaluate our last offer?" Judges might meet in chambers with the lawyers but without clients and say, "Help! I don't know what to do next." It is amazing how many good ideas smart lawyers can invent when requested.

It can also be helpful to ask each lawyer to summarize the opponent's argument. Parties are often startled into reality by hearing their adviser articulate strong arguments for the other side.

4. Review progress: When negotiations stall, it's easy to forget how much has been accomplished. Help the parties focus on the progress made. For example, "When we started today, defendant insisted there was no liability and that the case had zero value. Now, four hours later, there's money on the table. Not much, perhaps, and nowhere near enough. Still, moving from 'if' to 'how much' is significant progress." Focus on the actual success, not the potential failure.

Pay attention to what the parties are doing, not what they are saying. A party may not acknowledge aloud the strength of an opponent's argument, but significant movement in her settlement offer or demand speaks volumes.

5. Visualize settlement: Encourage parties to imagine the feeling or results of settlement. Fifty thousand may be an abstract or arbitrary number, so let it represent a shiny new car or an impressive pile of \$20 bills stacked on the conference room table. If the plaintiff had that pile of money, would she pay off credit cards, buy stocks, go back to college; or would she throw it back, as one would an undersized fish, and invest in a speculative personal injury trial with no guarantee of any return?

Casinos understand this concept. By using chips instead of cash, gamblers don't feel that they are spending real money at the table.

Another idea to visualize: the end of litigation. If the party isn't enjoying the settlement conference, he really won't like weeks in trial. If he squirmed during his deposition, he's going to hate cross-examination. If his blood pressure rises every time he thinks about his case, help him imagine freedom from his adversary.

6. Reach small agreements; settle small parts: An impasse is, in effect, a failure of momentum. Build it back up again. Can the parties agree on some parts of the case? For example, can they agree that the case turns on the interpretation of a single contract provision? If so, you've got the settlement train rolling again.

Sometimes parts can be settled without resolving the whole case. In a personal injury case, for example, a carrier can agree to pay the medical pay benefits even if liability is disputed. The carrier gets used to paying money to the claimant. The claimant softens her view that the insurance adjuster is a tight-fisted devil.

Momentum returns.

Ask the parties to identify everything that might go into a complete resolution.

The settlement will probably involve payment of money, a standard release and a dismissal with prejudice. What else? If money is to be paid, discuss the timing of payment: A plaintiff may become motivated if the carrier promises prompt payment. Perhaps there are documents that should be destroyed or returned. Perhaps one party would agree, if settlement is reached, to stay away from the other's workplace. This focuses attention on resolution and it keeps the conversation alive.

7. Consider further fact-gathering: Even if you are done for the day, negotiations can continue. If the discussions have bogged down over the value of the house, for example, take a break while the property is appraised. The very process of agreeing on a next step - how to appraise, whom to depose - creates momentum for further agreements.

8. Check in with each other: Often, the lawyer has been driving the settlement discussions. Parties usually do as they are told. You must ensure that the client isn't just saying "no" because she doesn't want to disappoint her lawyer. If the lawyer is uncertain how to transition from charging advocate to peacemaking compromiser, ask for the judge's assistance.

9. Monitor your own internal responses: Whether your role is the lawyer fighting for a client's cause or the judge juggling hundreds of matters, you care about this case. You want the best outcome for the parties. In your zeal, you may develop attitudes that hinder progress: One of the players makes your flesh crawl, you're still annoyed about a discovery dispute or you're stuck on a certain outcome. Regardless, these attitudes are not serving the litigants. Many cases that appear hopeless can and do settle when the lawyers and judge maintain optimism, humor and hope.

10. Give the participants permission not to settle: A client who feels threatened when a judge or a lawyer insists on settlement may feel trapped and react irrationally by refusing to budge. If parties are showing signs of distress after working hard to settle, it's sometimes useful for the judge to acknowledge their efforts and add, "It's OK if you don't settle. I promise I will give you a fair trial." The lawyer can assure his client that, although he recommends settlement, he is willing to try the case if necessary. More often than not, the parties will say they don't want a trial, they want to settle and voila! You are back in business.

Vigilant judges and lawyers will take preventative steps during the settlement conference to encourage parties to make reasonable offers and demands, to keep the discussion flowing and to refrain from drawing lines in the sand. However, should it happen that, after good-faith negotiation, the parties declare a stalemate, do not give up and go home. Resist the urge to insist that the parties "split the difference." Instead, have faith in the parties' ability to resolve their dispute, and try some of these techniques to regain momentum.

Class 12

Landlord v. Tenant

(#1, 2, 3)

This is an unlawful detainer (eviction) dispute arising out of nonpayment of rent.

Landlord owns a 10-unit apartment building in SF. The building has been in his family his entire life and is his only asset. He is in his late 70's and was recently diagnosed with dementia, and he now requires full-time care. His oldest son left his lucrative job as a screenwriter in LA to take care of his Dad and manage the property. Son discovered that many of the units need work, and several tenants are behind in their rent. Because Dad needs money for his medical care and to fund necessary improvements, Son issued 3-Day Notices to all tenants who owe Dad money.

Tenant is a single mother of four-year-old twins. She has lived in the building for 5 years and has been a model tenant until this year. Her rent is \$2000/month. She is a high-end house painter, but the downturn in the economy has caused her business to fall off. Nevertheless, she always pays what she can. Her payment history this year is as follows:

May	1900	August	1000
June	1800	September	2000
July	1700	October	1500

Legally, before a landlord can sue to evict a tenant who has not paid rent, he must serve the tenant with a "3 day notice," demanding full payment within those three days. Landlord issued to Tenant a proper three day notice for \$2100. Tenant did not pay the arrearage within the three days, and Landlord declined her offer of the November rent. The only issue at trial will be possession (eviction) and damages (unpaid rent).

Class 12

ETHICS IN MEDIATIONS

(##1, 2, 3)

A. Ethical Issues for Mediators

1. You are mediating the division of a law practice. The lawyer-litigants have come to you because they hope to preserve their reputations and, although there has been plenty of mud-slinging, they do not want to air their dirty laundry. They were once best friends but are now arch enemies. The attorney for plaintiff is as aggressive and disrespectful as the defense lawyer is professional and reasonable. “Rambo” talks over every one in the room, including you. In private session, he refuses to negotiate until he can explain in lurid and lengthy detail all the bad evidence he has uncovered about defendant during the litigation.
 - a. What strategies will you use for handling Rambo?
 - i. Demo the statement of ground rules
 - ii. Would you consider putting the ground rules in writing? What would be the benefit of doing so?
 - b. What strategies will you use for avoiding embroilment?
 - c. If Rambo is preventing otherwise willing parties from achieving a settlement, is there anything you can do?
2. After presiding over two sessions of the *Merle v. Regina* PI mediation, the parties are \$2,000 apart. You are frustrated by the conduct of the adjuster, who has been stubborn and surly. Similarly, his lawyer has been difficult and unreasonable. You strongly believe that defendant should pay the last \$2,500 and be done with the case.
 - a. What is going on here?
 - b. How would you describe the mediator’s mental state?
 - c. What do you think the mediator should do?
3. As negotiations are grinding to a close in the *Merle v. Regina* case, plaintiff cries in frustration that he will take \$27,500 to end the agony of litigation. When you go to tell defendant that you believe you have a settlement, the adjuster tells you that he will meet plaintiff’s last demand of \$30,000.
 - a. What is the problem here?
 - b. What are you worried about?

- c. What do you say or do?
 - i. Be ready to demo or model your solution
- 4. In the *Views vs. Trees* case, the uphill neighbor (the party animal who wants his downhill neighbor to cut her beloved trees) is a lawyer. He had his law firm file the complaint for nuisance against the downhill neighbor. The downhill neighbor is not a lawyer and cannot afford one. You believe the uphill neighbor is just trying to bully the downhill neighbor into a favorable settlement. You have researched the law and you believe the law strongly favors the downhill neighbor.
 - a. Can the mediator give legal advice? Can the mediator recommend to the downhill neighbor that she retain a lawyer?
 - b. Can the mediator take the side of the downhill neighbor?
 - c. Can the mediator discuss the law with downhill neighbor? If so, how would the mediator go about it?
 - i. Demo the discussion between the mediator and the downhill neighbor. Who is present? What is said?
- 5. In the next round of *Views vs. Trees*, downhill neighbor has a lawyer, but he is a corporate lawyer who knows nothing about mediations or litigation. The uphill neighbor knows it. You are worried that the downhill neighbor will be taken advantage of.
 - a. What do you do when one side is out-lawyering the other side?
 - b. Can you help the lawyer do a better job for his client?
 - c. Can you meet privately with the downhill neighbor without her lawyer, so that you can tell her your concerns?
 - d. What do you do if you see the lawyer is pushing his client into a terrible settlement?
 - e. If the lawyer advises his client to reach a settlement that you consider totally unfair, what should you do?

B. Ethical Issues for Lawyers in Mediation

- 6. You represent Mr. Merle. He told the police at the accident scene that the car brushed his right leg but that he wasn't immediately aware of pain. He answered interrogatories stating that the car struck him in his right leg but did not knock him down. He testified at his deposition that the car struck him in the right leg and knocked him to the ground. Now, at mediation, he is telling

the mediator that the car hit him, knocked him up into the air onto the windshield before he landed in a crumpled heap on the roadway.

- a. Do you have an obligation to say or do anything? If so, what?
 - b. What if Mr. Merle denies at mediation that he has been in previous car accidents, but you knew otherwise?
7. Mr. Merle is desperate to settle the case. You know that, if he starts talking about his feelings toward the case, he will reveal this fact, and this will hurt your bargaining power. In joint session, the mediator starts asking the parties open-ended questions about the value of resolving the dispute. What do you do?
8. You represent Mr. Merle. The defense offers \$25,000. You are certain that he could get \$27,500 if you just hold out for another hour or two, and you explain this to Mr. Merle. He says he is tired and hungry and just wants to accept the offer and go home.
- a. Do you have an obligation to try to prevent him from accepting the offer?
 - b. Does the amount at issue matter? Would it make a difference if you knew the defense would come up to \$50,000 if you kept negotiating?
9. After an all-day mediation in *Merle v. Regina*, the parties shake hands on a \$28,000 settlement. A week later, the other side sends you the closing papers, which your client must sign. Mr. Merle has second thoughts and will not sign the settlement papers.
- a. Do you have an obligation to insist that he sign the papers, or do you have an obligation to move forward with the lawsuit?
 - b. What if, instead of a handshake, the parties had signed an informal but binding agreement that required your client to execute a formal settlement agreement at a later time, which he now refuses to sign?
10. At the mediation, opposing counsel has crawled way under your skin. She has misrepresented the facts, accused your client of perjury, and suggested that you are promoting a frivolous case.
- a. What should you do under these circumstances?
 - b. Do you have an obligation to share your feelings with the mediator, or with your client, and (if so) why?

11. You are convinced that the offer on the table gives Mr. Merle a far better outcome than anything that could happen at trial. You have explained the costs and risks of trial, his BATNA and WATNA, and the value of achieving peace on tolerable terms. He insists on rejecting the offer and going to court.
 - a. What ethical issues are raised in this situation, and how do you handle them?

Class 13

High Conflict Personality Checklist

Judge Lynn Duryee, San Rafael

(##1, 2, 3)

Common characteristics:

- Can be very attractive, attentive, convincing, intelligent
- Displays intense emotions – especially anger and helplessness
- Can never see her contribution to the problem
- When facts don't prove her point, changes "facts" to fit the feeling
- Often has support people
- Emotionality seems out of proportion to problem
- Hates the word "no"
- Often in interpersonal conflict
- Identifies as victim
- Avoids treatment
- Seeks others to confirm that she was right and other was wrong
- Blame, blame, blame

Helpful approaches:

- Set limits: time or issues
- Listen respectfully, even to anger and blame
- Do not react! This is NOT personal. She did not make it up for you
- Avoid criticism – even if deserving, will not help
- Try to find kernel of truth
- Offer assurances of how well she is performing
- Avoid overreacting – she expects it and will try to provoke it
- Look for characteristics of personality disorder – helps detach
- Maintain healthy skepticism
- Take frequent breaks

Class 13
Civil Harassment Restraining Order –
Neil v. Martins

(##1, 2, 3)

Mr. Neil has filed a request for a civil harassment restraining order. He says he visited the defendant twice for aesthetician services (eyebrow waxing). A week later, he began to receive uninvited text messages from defendant. He wrote back, telling defendant that he is married and does not wish to receive any messages from defendant. Defendant thereafter sent a dozen email/FB/text messages, stating she is mentally ill and addicted to plaintiff. She promised never to contact him again. She called him a “womanizer and creep” and said she “would rather die than go through the hell I have endured.” She posted several messages on plaintiff’s FB business page stating “he is a womanizer and a creep.” She said in a VM that plaintiff tapped into her accounts and has been stealing information.

Ms. Martins filed her own request for a civil harassment restraining order in response. She says that Plaintiff should be ordered to stay out of all of her electronic devices. She says she filed a police report against the plaintiff for changing her password and accessing her email. She states, “Mr. Neil contacted me for esthetician services in January 2012. He then Facebook friended me and I naively accepted his friendship. Since then, I have experienced fraudulent charges on my credit cards, which was reported to the police. I was recently told by Comcast that my account passwords were changed. I have reason to believe that Mr. Neil did this.”

CCP Section 527.6 states, “A person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment.” Civil harassment is defined as “a pattern of conduct composed of a series of acts over a period of time evidencing a continuity of purpose, including stalking an individual, making harassing telephone calls, or sending harassing correspondence to an individual by any means” or “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause emotional distress.”

The burden of proof to obtain a restraining order is “clear and convincing evidence.”

Class 13:

Civil Harassment Restraining Order – Neil v. Martins

(#2)

CONFIDENTIAL INFORMATION FOR MEDIATOR

This is a very difficult case because you cannot tell if one or both of the parties is crazy. You will spend time trying to get to know the participants. Eventually, you will come to see which one you start to believe.

Attached is a checklist for recognizing and dealing with a litigant who has a personality disorder. You may want to use this during the mediation. Above all, do your best to remain neutral and even-tempered.

Class 13

Civil Harassment Restraining Order – Neil v. Martins

(#3)

CONFIDENTIAL INFORMATION FOR NEIL

You are very upset about this crazy person taking over your life. You did nothing to cause her to be attracted to you. You have saved all your evidence of text messages, FB postings, and VM, and you bring them with you to the mediation.

Your wife has told you to get this crazy person out of your life. But you are worried that even showing up for a mediation is giving her another opportunity to be with you.

You can't afford to take time off work and go to court. You need to settle the case today. You would prefer a 3 year restraining order, but you will settle for something less.

Class 13

Civil Harassment Restraining Order – Neil v. Martins

(#1)

CONFIDENTIAL INFORMATION FOR MARTINS

Note to student: This will be a difficult part for you to play, but try to play it as convincingly as possible.

You grew up in an affluent family, you are brilliant and beautiful, graduated Harvard Phi Beta Kappa. You were going to medical school but your boyfriend died during your first year, so you have taken off some time to recovery. You got this job as an aesthetician because you didn't want to be living off your parents' money. You plan to return to med school at UCSF in the spring semester.

You are emotionally fragile. You see the world in black-and-white, evil-and-good, all-or-nothing terms. Your email has been hacked and you suspect it is plaintiff, but you can't prove it. You feel like a victim.

Use every opportunity in the mediation to emote (but realistically); try to get the mediator's sympathy; use every charm you have.

You are kind of crazy but you don't know it. But you are only crazy around relationships. In school and in business, you are very successful.

You will bring with you a support person to the mediation – this will surprise everyone. The person is from the local battered women's shelter.

Class 14
Juan and Maria
(##1, 2, 3)

Juan and Maria wish to settle their child custody dispute. They are not on speaking terms.

Both Juan and Maria are in their late 20's. They had a brief dating relationship when they were students at USF Law School. When Maria realized that Juan was not the man for her, she tried to break up with him. Juan, who was mildly intoxicated at the time, became uncharacteristically angry and beat her up. He was thereafter charged with a misdemeanor domestic violence battery, Penal Code Section 273.5. He plead guilty, served time in jail, completed the mandatory 12 month domestic violence course and all required counseling, and was discharged from probation after successfully completing it. Because of his exemplary performance, he was able to get the conviction extinguished.

Maria didn't know it at the time, but on the night she broke up with Juan, she was pregnant with his child. She subsequently gave birth to a daughter, Eva, who is a happy, healthy, and well-adjusted three-year old. Maria graduated law school and works for the District Attorney's office in San Francisco. She is a single mother.

Juan dropped out of law school after the fight. He was able to resume work as a firefighter. Other than this one night, he has had a peaceful, law-abiding life. Out of shame for his crime and respect for Maria, he has stayed out of Eva's life. He now wishes to assume his role as Eva's father. He recognizes that it will take some time for his daughter to be comfortable with him, and he is willing to gradually enter her life.

Maria and Juan have not spoken since the night he was arrested. They last saw each other in court when he entered his guilty plea.

Family Code Section 3020 states:

(a) The Legislature finds and declares that it is in the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.

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(b) The Legislature finds and declares that it is in the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child.

Class 14
Juan and Maria
(#3)

CONFIDENTIAL INFORMATION FOR MEDIATOR

Based on the psychological reports you have received, you believe that Juan's incident of domestic violence was a one-time event and is not likely to happen again.

You read Family Code Section 3011 to prepare for the mediation.

You want to make sure you give Maria plenty of time to tell you what her fears and concerns are.

It occurs to you to discuss with Juan whether an apology might help. How will you have this discussion? Where will the apology occur? Will you talk to Maria about it first?

Class 14

Juan and Maria

(#2)

CONFIDENTIAL INFORMATION FOR MARIA

It embarrasses you to admit it, but you are still afraid of Juan. You had no idea he was a violent person, and that night he beat you up, you thought you were going to die. It was the most terrifying thing that ever happened to you.

You love your daughter more than life itself. Because of this, you feel deep sadness that she does not have a father in her life.

You consider yourself a fair person. You want to do the right thing.

You have no desire to have a relationship with Juan.

Class 14

Juan and Maria

(#1)

CONFIDENTIAL INFORMATION FOR JUAN

You are still in love with Maria.

You feel terrible for what you did. It humiliates and shocks you that you beat her up. You have been in therapy since the incident to try to understand how you could have behaved that way. You have stopped drinking as a result, and you have made amends with your own father, who was prone to violent outbursts.

You want to be a good father to Eva. You are willing to do anything to make it happen.

